Supreme Court, U.S.
FILED
NOV 12 1985
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No. 84-1555 and No. 84-1567

In the Supreme Court
OF THE
United States

October Term, 1985

JOHN L. CONNOLLY, *et al.*,
each in his respective capacity as Trustee of the
OPERATING ENGINEERS PENSION TRUST,
Appellants,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

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On Appeal from a Three Judge Court of the United States District Court for the Central District of California

REPLY BRIEF OF APPELLANTS CONNOLLY, ET AL.

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I.

NEITHER "RATIONALITY" NOR "FAIRNESS AND JUSTICE" IS A SUFFICIENT MEASURE OF TAKING CLAUSE PROTECTION.

The appellee Pension Benefit Guaranty Corporation ("PBGC") argues throughout its brief as if the withdrawal liability statute should be exempt from examination under the Taking Clause because the overall statutory scheme can be characterized as regulation "adjusting the benefits and burdens of economic life." In fact, PBGC is so insistent the statute be tested only under the Due Process Clause, not under the Taking Clause, that substantially all of PBGC's statement of the case and more than half of the length of PBGC's argument (PBGC Br., pp. 29-43) is devoted to the merits of a challenge under the Due Process Clause, even though no due process issue is raised in this appeal. Clearly, PBGC is more comfortable in showing that the withdrawal liability statute meets the minimal "rationality" test applicable to review of such legislation under the Due Process Clause as reflected in *P.B.G.C. v. R. A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709 (1984) and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882 (1976), than in attempting to sustain the challenged statute under the Taking Clause.

But in rushing to the more congenial environs of the Due Process Clause, PBGC fails to explain why the statutes challenged in *Gray*, in *Turner Elkhorn* and in this case sufficiently involve a taking of property so as to require reaching the merits of a challenge under the Due Process Clause, but yet no taking of property occurs sufficient to implicate the Taking Clause. If no taking of property were present in the statutory provisions challenged in *Gray* or in *Turner Elkhorn*, then this Court would have disposed of the cases on that basis rather than by deciding on the merits that the requisite due process of law was satisfied by the statutes involved. Thus, PBGC's basic rationale contains a significant inconsistency.

Further constitutional error arises in PBGC's attempt to convince the Court that the Taking Clause affords substantially the same protection as does the Due Process Clause. Specifically, PBGC argues as if governmental regulation "goes too far" and becomes recognizable as a "taking of property" only if the challenged statute is not "precisely suited" to the overall regulatory purpose of the statutory scheme. PBGC Br., p. 28. This is a serious misreading of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922), in which Mr. Justice Holmes explained that a regulation "goes too far" when the regulation "reaches a certain magnitude, [and then] in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.*, 260 U.S. at 413, 43 S.Ct. at 159. *See, also, Williamson County v. Hamilton Bank*, ___ U.S. ___, 105 S.Ct. 3108, 3123 (1985). More recent decisions of this Court such as *Williamson County* make sufficiently clear that a regulation "goes too far" when any property is taken; when that occurs, the taking of property must satisfy the Taking Clause. *Id.*, 105 S.Ct. at 3123-24. *See, also, Penn Central, infra,* 438 U.S. at 127, 98 S.Ct. at 2661.

In a similar vein, PBGC contends that "fairness and justice" should be the essential determinant of whether government must comply with the Taking Clause (PBGC Br., p. 27), while at the same time arguing, rather incongruously, that "the Taking Clause should not be invoked to revive 'the ghost of *Lochner* [*v. New York*, 198 U.S. 45, 25 S.Ct. 539 (1905)].' " PBGC Br., p. 27. Finally, PBGC concludes:

> "[T]he Multiemployer Act rationally adjusts the benefits and burdens of economic life in a manner that is not arbitrary and is reasonably suited to carry out its objective. Consequently, it satisfies the requirements of both the Due Process and Taking Clauses of the Fifth Amendment." PBGC Br., p. 41.

What PBGC argues in substance, but states somewhat obliquely, its supporting *amicus* states in a direct and final conclusion:

> "The [Takings Clause] is satisfied if . . . the [Congress] *rationally could have believed* that [the withdrawal liability provisions] would promote [MPPAA's] objective."[1] (Emphasis in original.)

This is constitutional error of the *utmost gravity.*

The decisions of this Court certainly do not support the radical conclusions urged by PBGC.

> "[H]owever 'rational' the exercise of the [legislative] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *U.S. v. Security Industrial Bank,* ____ U.S. ____, 103 S.Ct. 407, 410 (1982).

Moreover, this Court's consideration of "fairness and justice" in past Taking Clause decisions has been for the purpose of *preserving* Taking Clause protection, *not* to relieve the Government of the obligation to pay compensation when property has been taken. For example, in *Armstrong v. U.S.,* 364 U.S. 40, 48-49, 80 S.Ct. 1563, 1568-69 (1960), upon which PBGC relies, this Court required compensation for the "taking" of mechanic's liens on ships, despite the argument of the Government that the liens were not "taken" but merely became unenforceable under the doctrine of sovereign immunity when the Government took possession of the ships. Whenever a fundamental element of ownership of property is severed, this Court has invariably required compensation. *Cf., Kaiser Aetna v. U.S.,* 444 U.S. 164, 178-180, 100 S.Ct. 383, 392-93 (1979) ["the Government's attempt to create a public right of access to the improved pond goes so far beyond

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[1]Brief Amicus Curiae of the National Coordinating Committee, at p. 28.

ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon.* . . . (W)e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"]; and, *Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 327 (1979) ["the regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . (I)t is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds"]. As in the circumstance of a physical occupation of real property, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434-35, 102 S.Ct. 3164, 3175 (1982), when a complete destruction or transfer of ownership of property rights has been effected by government action, this Court has always required compensation and has never reasoned that a "taking" can occur without compensation in the interests of "fairness and justice."

Minimal "rationality" as applied under the Due Process Clause would furnish absolutely no real protection against majoritarian oppression of minority interests, a primary aim of the Taking Clause. *See* Connolly Br., pp. 11-14. The same can be said of "fairness and justice", since both "rationality" and "fairness" are defined ultimately within a framework of assumptions controlled by the majority. The Framers had no misconception that a "fairness machine" could be developed to furnish the protection sought, nor did the Taking Clause ultimately rely upon such an ephemeral concept. Requiring "just compensation" to be paid whenever property is taken was the Framers' expressed view of the most reliable standard for assuring protection of the interests involved.

The concepts of "rationality" and "fairness" do not adequately comprehend the concerns for preserving the liberty of all members of a free society. Conclusions

regarding "rationality" and "fairness" can be derived within the context of a particular statute based on assumptions controlled by a majority in Congress, but the Taking Clause serves a broader and more fundamental role in securing the welfare of this and future generations. Therefore, the constitutional inquiry must consider the consequences for the economic and political dynamics of this republic which are embodied in Taking Clause protection against governmentally caused forfeitures of property.

PBGC would ask only whether the governmental taking of money from employers to pay "for potential shortfalls [in pension trust assets] that could disappoint employee expectations" (PBGC Br., p. 28) is rational and fair *vis a vis* the employers and employees. This Court must answer whether empowering Congress to enact such a statute would cause intolerably high damage to the personal freedom guaranteed by the Taking Clause to the children of the employees and the employers, as well as all others protected by the Constitution. Depriving future generations of the Taking Clause guarantee that the material fruits of their labors will not be forfeited under governmental "economic regulation" would, experience shows, leave no adequate catalyst able to unleash the productive and creative energies of individuals. This highly important infringement of the personal liberty of every American would be a high price, indeed, to pay for the very marginal gain in material wealth afforded by the withdrawal liability statute to perhaps ten million participants of multiemployer pension trusts.

In this light, the Taking Clause is seen more clearly in its fundamental role, serving not merely as a protection of the *status quo* for the benefit of the present "haves" of society, but likewise protecting the aspirations of the "presently have-nots" and catalyzing the truly remarkable degree of vertical mobility achieved by individuals and families in society under our Constitution. Protection of

private rights in property as a key limitation on the power of government is undoubtedly at the center of our successful political economy, which has produced an accelerating increase in the wealth and the relative welfare of our citizenry beyond any precedence.[2] Adoption of rationality and fairness as the functional requisites for taking property by economic regulation would effectively reduce the Taking Clause to an abstraction without substance, an aimless legal force that might serve or disserve its intended purposes: to protect individuals against the tyranny of the majority; to release the productive energies of individuals for the betterment of self and society; to keep Government within recognizable limits; and to establish and hold fast to the scope of individual freedom.

II.

THE TAKING OF PROPERTY BY THE STATUTE IS NOT EXCUSED BY AN ABSENCE OF "PHYSICAL INVASION" OR BY "AMELIORATING" PROVISIONS OF THE STATUTE.

The three factors considered by the Court in determining whether a taking of property had occurred in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104,

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[2]Long before the emergence of the current post-industrial era, the unmatched success of our economic system was acknowledged even by its most antagonistic critics.

> "The bourgeoisie, during its rule of scarce 100 years, has created more massive and more colossal productive forces than have all preceding generations together. Subjection of Nature's forces to man, machinery, application of chemistry to industry and agriculture, steam-navigation, railways, electric telegraphs, clearing of whole continents for cultivation, canalization of rivers, whole populations conjured out of the ground — what earlier century had even a presentiment that such productive forces slumbered in the lap of social labor?" K. Marx & F. Engels, *The Communist Manifesto* (New York: International Publishers 1948), pp. 13-14.

98 S.Ct. 2646 (1978), are useful primarily in analyzing a statute which regulates or limits the future use of property under continuing ownership by the deprived party. This is not such a case of governmental limitations placed on continued ownership of property, since, as PBGC concedes, "[a]n employer is, to be sure, completely deprived of whatever amount of money [the employer] is ultimately obliged to pay pursuant to the statutory liability." PBGC Br., p. 23.

> "Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Central Transportation Co. v. New York City* . . . and *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035 (1980) where governmental action affected some but not all of the 'bundle of rights' which comprised the 'property' in question." *U.S. v. Security Industrial Bank, supra,* 103 S.Ct. at 411.

Thus, the Court was able to perceive the elements of a "taking" of property in *Security Industrial Bank* and in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446 (1980), without need for detailed analysis of the three factors found useful in *Penn Central.*

By comparison, PBGC argues as if the three factors considered in *Penn Central* are to be used, not as tools to enhance precise understanding, but as screens intended to obfuscate direct examination of the statute. The brief of appellants Connolly, *et al.,* ("the Trustees") discusses in detail each of the three factors found useful in *Penn Central* in determining whether a taking of property had occurred (Connolly Br., pp. 15-30), but PBGC makes almost no direct response to any of the arguments presented. Instead, PBGC suggests that determining "the character of the governmental action" involves merely categorizing the general nature of the overall statutory scheme as either "economic regulation" or as a

"physical invasion," with only the latter being a taking of property. PBGC Br., pp. 22-23.[3] Such a suggestion is both inaccurate and simplistic.

This Court has held that governmental action which causes a permanent physical occupation of real property invariably constitutes a taking of the property to the extent of the physical occupation. *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 458 U.S. at 434, 102 S.Ct. at 3175. However, the Court's decisions make equally clear that a physical occupation of real property is not the *only* type of governmental action for which the Taking Clause requires compensation. *Cf., U.S. v. Security Industrial Bank, supra,* and the cases discussed therein (*see* Connolly Br., p. 18), each of which involved the granting of Taking Clause protection for property in the nature of lien rights. Since lien rights do not involve present physical possession of property, no "physical invasion" by government was present in those cases.

Moreover, "physical invasion" is subject to an interpretation which would encompass governmental action taking physical possession of any property, including money. For example, the State took physical possession of money rightfully accruing to the deprived party in *Webb's Fabulous Pharmacies,* although that "taking" could scarcely qualify as a physical occupation of real property such as was involved in *Loretto.* The withdrawal liability statute involved in this case requires the deprived party to surrender physical possession of money and, if the

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[3]Attempting to support this position, PBGC argues that the statutory obligation is "monetary," does not involve "identifiable property," and should not be treated as a taking of property under the Taking Clause because *"the law leaves the employer free to select any assets it wishes to satisfy the statutory obligation."* (Emphasis added.) PBGC Br., p. 22. The Taking Clause does not tolerate this astonishing hypothesis that any governmental taking of property is excused so long as the deprived party is permitted to select the particular portion of his assets to be forfeited.

money is not paid, the statute enables a pension trust to take physical possession of whatever property, real or personal, belongs to the employer pursuant to a resulting judgment. Thus, the withdrawal liability statute ultimately results in a much more significant "physical invasion" of the property of the deprived party than occurred through the governmental action in *Loretto,* which involved occupation of minimal space on an apartment house roof for a cable television installation. *Loretto,* 458 U.S. at 422, 102 S.Ct. at 3169.

PBGC next suggests that, although the employer is "completely deprived" of money in the amount of the statutory liability, the "economic impact" is "ameliorated by various moderating provisions of the Act" (PBGC Br., p. 23), thereby presumably achieving compliance with the Taking Clause. Small wonder that PBGC made no response to the Trustees' discussion of the historical foundation of the Taking Clause. Connolly Br., pp. 10-14. The "amelioration" required by the Taking Clause for any governmental taking of property for public use is "just compensation," not mere "moderating provisions" designed to take the property as efficiently or as painlessly as is consistent with governmental objectives.

Again, the "economic impact" factor discussed in *Penn Central* is analytically useful primarily when ownership of the affected property remains in the deprived party, and some but not all of the "strands" in the "bundle" of property rights have been slashed through. In such circumstances, the Court has considered "economic impact" as a basis for finding a compensable taking even though the deprived party continues to own some or most of the bundle of property rights. But "economic impact" has never been viewed by the Court as a basis for permitting a complete taking of property to be uncompensated. Such a complete deprivation of money "has every possible element of a Fifth Amendment 'taking,' " *Armstrong v. U.S.,* 364 U.S. 40, 48, 80 S.Ct. 1563, 1568 (1960), and *Arm-*

strong runs directly contrary to PBGC's suggestion that withdrawal liability is merely a "consequential incidence" of valid regulation.

Referring to the third factor of the *Penn Central* analysis, the "reasonable investment-backed expectations" of the deprived party, PBGC argues essentially that a statute may take property without compensation at any time after its effective date because the "published law provide[s] sufficient notice of what will happen in the future [so] that any 'expectation' to the contrary is patently unreasonable." PBGC Br., p. 24. If this were true, the property owner in *Webb's Fabulous Pharmacies* could have been required to forfeit the interest earned on the funds deposited with the government, because the statute requiring the forfeiture existed when the owner chose to deposit the funds. *See,* 449 U.S. at 160-161, 101 S.Ct. at 450-451. This Court held to the contrary, ruling that a statute "may not transform private property into public property without compensation . . . [since] [t]his is the very kind of thing that the Taking Clause . . . was meant to prevent." *Id.,* 449 U.S. at 164, 101 S.Ct. at 452. By contrast, PBGC's proposition would permit any statute to take property without compensation at any time after its effective date, which certainly finds no support in this Court's decision in *Ruckelshaus v. Monsanto Co.,* ____ U.S. ____, 104 S.Ct. 2862 (1984).

Essential to the reasoning in *Ruckelshaus* was the provision that only the trade secret property Monsanto voluntarily chose to submit after the 1978 effective date of the amended statute was subject to subsequent use for public purposes. *Id.,* 104 S.Ct. at 2875. At the same time, the Court held that trade secret property submitted to the EPA between 1972 and 1978, prior to the effective date of the amended statute, could not be subjected to public use under the amended statute without just compensation for the property taken. *Id.,* 104 S.Ct. at 2877-79.

Rather than faithfully applying this rationale to permit the property owner to decide after the effective date of the statute whether to engage in the regulated conduct, PBGC and the withdrawal liability statute would require the employer to forfeit property merely because the employer declines to engage in the regulated conduct after the effective date of the statute. Applying such a distorted rationale in *Ruckelshaus* would have required Monsanto to forfeit the trade secret property filed with the EPA between 1972 and 1978 if Monsanto failed to submit additional trade secret property for registration after the 1978 enactment of the amended statute. In fact, the position of the employer under the withdrawal liability statute is even worse, because whether a "withdrawal" occurs is neither voluntary nor subject to the unilateral control of the employer. *See* Connolly Br., p. 16.

Finally, PBGC returns to its contention that the 1974 enactment of "contingent liability" gave "ample notice" of withdrawal liability. PBGC Br., p. 26. No acknowledgment is made of the showing in the Trustees' brief (Connolly Br., pp. 25-26) that the 1974 statute actually entrapped participating employers at that time by making them liable for a forfeiture of property if they withdrew in sufficient numbers to cause termination of the pension plan. PBGC's argument is, in essence, that a statutory taking of property can evade the Taking Clause if, after the initial statutory enactment and before a final adjudication on the merits, the statute is amended to accomplish the taking of property under modified provisions.

III.

WITHDRAWAL LIABILITY, LIKE A TAX, IS A TAKING OF PROPERTY, BUT ONE WHICH MUST COMPLY FULLY WITH THE TAKING CLAUSE.

A second *amicus* supporting PBGC contends that a statutory requirement that a person pay money is not "a

'taking' of his 'property,' within the meaning of the Takings Clause . . ., otherwise, government could not even raise revenue through taxation." UMW Trustees' Br., p. 14. Clearly, such is not the case. Every tax is a taking of property,[4] but one which occurs under the express power of taxation granted to Congress under Article I, § 8, of the Constitution. This Court construes the various provisions of the Constitution in a manner which best achieves the full intent of each provision and "is not self-destructive . . ., [so] that the powers which [the Constitution] confers on the one hand it does not immediately take away on the other . . ." *Billings v. U.S.*, 232 U.S. 261, 282, 34 S.Ct. 421, 424 (1914). *See, also, Brushaber v. Union Pacific*, 240 U.S. 1, 24-25, 36 S.Ct. 236, 244 (1916) [indicating the potential for invalidation of a tax law as a "taking" in violation of the Fifth Amendment if the taxing power is abused so badly as to be "not the exertion of taxation but a confiscation of property"]; *Steward Machine Co. v. Davis*, 301 U.S. 548, 585, 57 S.Ct. 883, 890 (1937) ["discrimination (in taxation), if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment"]; and *Marchetti v. U.S.*, 390 U.S. 39, 58, 88 S.Ct. 697, 708 (1968) ["We are equally obliged to give full effect to the constitutional restrictions which attend the exercise of (the taxing) powers"].

Of course, the legislative power to tax is not implicated in this case, since Congress did not purport to exercise the power to tax in enacting the withdrawal liability statute. "Withdrawal liability" is not called a tax, is not

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[4] "[Taxation] is not merely similar to eminent domain; it is the same, as far as the power itself goes. * * * The distinction between what we call taxation and what is called eminent domain lies, not in any differences between money and things, but between even and uneven exaction." Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 571-72 (1972).

laid and collected as a tax, and is payable to another private party rather than the Government.[5] Nevertheless, the most remarkable parallel to be drawn between a "tax" and "withdrawal liability" is that both involve a statutory rquirement that a person pay money — and who would deny that any tax law involves a governmental taking of property, albeit one that is empowered under Article I, § 8? Clearly, not being a tax, "withdrawal liability" is a governmental taking of property within the meaning of the Taking Clause.

IV.

UNLIKE REGULATORY STATUTES WHICH GOVERN ECONOMIC CONDUCT AFTER A CERTAIN EFFECTIVE DATE, THE WITHDRAWAL LIABILITY STATUTE "TAKES PROPERTY".

Given the opportunity to confront directly the Taking Clause issues presented by the Trustees' brief, PBGC instead expresses an inability to discern a constitutionally material difference between the effects of the "withdrawal liability" statute and other economic regulatory statutes, including the antitrust and minimum wage laws. PBGC Br., pp. 17-19. Of course, each of those statutes regulated conduct after its effective date and, in so doing, made persons liable in monetary damages for engaging in certain prohibited conduct after the effective date. By comparison, the challenged withdrawal liability statute requires one person (an employer) to pay money to another private party (a pension trust) if, after the statute's effective date, the employer fails to make a new

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[5] A taking of property by a private party under authority of a federal statute is no less a taking than when the Government directly takes the property. *Loretto v. Teleprompter, supra,* 458 U.S. at 432, n. 9, 102 S.Ct. at 3174.

contract with a third party (a labor organization) requiring monetary contributions to the pension trust.

The authority of Congress to regulate commerce as determined by *Northern Securities Company v. U.S.*, 193 U.S. 197, 24 S.Ct. 436 (1904) and *U.S. v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941), and the inefficacy of "forehanded agreements" to preserve executory profits in the face of newly enacted regulation are unquestioned. *See F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146 (1958). But the withdrawal liability statute plainly involves different considerations. The withdrawal liability statute does not merely lay down guiding rules by which all parties will be held accountable for future conduct. Payment of money is required in amounts determined by the statute, based on conduct occurring primarily before and partly after the effective date of the statute. The only "offensive" conduct occurring after this statute's effective date to trigger the forfeiture of property is the employer's exercise of a constitutionally protected liberty: to be — to exist — free of governmental compulsion to enter into any "consensual" obligations to another private party.

"Withdrawal liability" arises under the statute when the employer fails to reach a final agreement with a labor union covering wages, hours and other working conditions, and including continued participation in the affected pension trust. *See* Connolly Br., pp. 15-16. This legislative conduct — requiring a person to choose between forfeiting property and forfeiting the "natural, inherent, and inalienable" liberty to decline to enter into a private contract, 16A *C.J.S.* Constitutional Law § 491, pp. 568-69 — is fundamentally different from regulation of an executory contract, and amounts to a taking of property. A view to the contrary would empower Congress to engage in social control of the most egregious nature; *e.g.*, requiring specified classes of persons living in cities to forfeit property unless each enters into a private

agreement to work as a farm laborer for a certain duration. Where citizens are not free to decline the obligations of prospective private contracts, individual liberty has been diminished greatly to achieve the commensurate increase in government authority.

Unlike the antitrust, minimum wage and other purely regulatory statutes, the withdrawal liability statute does not permit the private party, after the effective date, to elect either: (1) to abide by stated requirements, or (2) to abandon participation in the regulated activity. Congress did not permit the employer even such a cold and hard decision as, *e.g.*, choosing between immediate termination of participation in multiemployer pension plans or acceptance of new liabilities as reflected in the statute. The specific intent of the statute was to cause a forfeiture of property if the employer failed to sign a new collective bargaining agreement providing for continued participation in such a pension plan at any time after the effective date of the 1974 statute [*see Connolly v. P.B.G.C.*, 581 F.2d 729, 732 (9th Cir. 1978)] or of the 1980 amendment to the statute (*P.B.G.C. v. R. A. Gray & Co., supra*, 104 S.Ct. at 2715). This is not mere regulation, but is a legislative attempt to deal with an intractable regulatory problem by requiring transfers of wealth from certain private parties to other private parties. Such legislative conduct was proscribed by the Taking Clause in order to forestall problems of a more fundamental and intractable nature.

The proper focus of attention in answering whether the statute takes property[6] is the effect of the statute on the deprived party: Does the enacted statute create a new,

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[6]Whether a statute effects a taking of property is not controlled by the "public" or "private" nature of the subsequent use of the property. *Cf.*, PBGC Br., pp. 19-20. Obviously, if property is taken, that is the fact whether subsequent use is public or private and, if no property is taken, neither private nor public use will occur.

legally enforceable obligation on the part of the deprived party to transfer ownership of property based on an event outside the control of the deprived party? That question is answered affirmatively here because, absent the statute, the employer would have no legal obligation to pay any amount to the pension trust as "withdrawal liability" and, subsequent to enactment, property must be transferred unless the employer agrees to continue in business under terms acceptable to a labor union. This goes beyond the limits of regulating the employer's conduct and takes the employer's property.

PBGC postulates that the statutory imposition of an obligation to pay money is not to be treated as a taking of property under the Taking Clause because, under the statute, the employer "became obliged to pay its fair share of any potential underfunding." PBGC Br., p. 20. Such circular reasoning amounts to an attempt to "redefine" the "property" owned by the employer as subject to the statutorily created obligation to transfer ownership to the pension trust. "Property" cannot be defined by legislatively created obligations against it for purposes of the Taking Clause, any more than "property" can "be defined by the procedures provided for its deprivation . . . " for purposes of the Due Process Clause. *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S.Ct. 1487, 1493 (1985). "Were the rule otherwise," the Taking Clause "would be reduced to a mere tautology." *Ibid.* This is particularly true where, unlike the property interests involved in *Loudermill* and *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974), the property interests owned by the employer were not conferred by the challenged statute, but were gained independently. And when interests in *intangible* property such as the right to continued employment are entitled to protection from legislative "redefinition" of "property," as *Loudermill* holds, then *a fortiori* no less protection is properly accorded under the Taking Clause to the employer's ownership interests in

traditional, *tangible* property including money, real estate and other personal assets.

V.

THIS STATUTE PROVIDES NO COMPENSATION FOR THE PROPERTY TAKEN, AND MUST BE DECLARED INVALID.

PBGC concedes that the withdrawal liability statute makes no provision for compensation to the employer required to pay withdrawal liability and "that no Tucker Act remedy is available to [the employer]." PBGC Br., p. 18, n. 14. Accordingly, upon a determination that the statute effects a "taking of property" within the meaning of the Taking Clause, the statute must be declared invalid. *See* Connolly Br., pp. 33-34.

VI.

THE PUBLIC PURPOSE OF ECONOMIC REGULATION SHOULD NOT BE PERMITTED TO EMPOWER AN ABUSE OF THE TAKING CLAUSE.

PBGC argues that the withdrawal liability statute does not violate the "public use" requirement of the Taking Clause, despite the statutory requirement that money be paid directly to another private party, because the statute has the legitimate "object" of improving the security of private pensions. PBGC Br., p. 19, n. 16. The holding of *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 103 (1954), is as follows:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." *Ibid.*

This does not mean, however, that a legitimate object may authorize the use of an illegitimate means or an abuse of the Taking Clause to achieve the stated object.

A statutory requirement that money be paid by one private party to another as a means of achieving a regulatory "object" is both a violation of a primary aim of the Taking Clause and an abuse of the power of eminent domain. A primary, direct purpose of the Taking Clause was to prohibit the government from taking the property from one person and giving it to another, since "a law that takes property from *A* and give it to *B* . . . is against all reason and justice." *See* Connolly Br., p. 13. Accordingly, a governmental transfer of money from one private party to another is illegitimate as a contravention of a direct purpose of the Taking Clause, and cannot be used as a means of achieving even a concededly legitimate legislative object. In other words, a statutory end cannot justify a constitutionally illegitimate means.

As discussed in the Trustees' opening brief (Connolly Br., pp. 31-33), a statutory transfer of money from one person to another cannot be accomplished by use of the power of eminent domain. Eminent domain empowers a government when the taking of particular property (such as real estate) or property of a particular nature (such as technical data on pesticides) becomes necessary in the public interest. Money, being fungible wealth, is not property of the nature which may give rise to the necessity of a government taking. Thus, unlike the cases involving real estate such as *Berman v. Parker,* or *Hawaii Housing Authority v. Midkiff,* 104 S.Ct. 2321, 2329 (1984), or involving pesticide data such as *Ruckelshaus v. Monsanto Co., supra,* 104 S.Ct. at 2879, the power of eminent domain provides no authority for the taking of money as "withdrawal liability." Moreover, in a proper case of eminent domain, the Taking Clause requires payment of just compensation for the property taken. Congress did not purport to use the power of eminent domain

and, as PBGC concedes, the statute makes no provision to compensate for the property taken. Under such circumstances, eminent domain by no means empowers Congress to declare a "public use" for funds to be taken from one private party and given to another. Surely, PBGC does not mean to argue that a legitimate "object" enables Congress to use the "means" of taking property without compensation under the Taking Clause.

Facing the express prohibition of the Taking Clause, and having no implied power of eminent domain as a foundation for the legislative action, the withdrawal liability statute takes property for "private use" and must be declared invalid.

VII.

WITHDRAWAL LIABILITY AND THE "PREMIUM" PROVISIONS OF THE STATUTE ENACTED IN 1980 ARE INSEVERABLE BECAUSE CONGRESS WOULD NOT HAVE ENACTED THE "PREMIUM" PROVISIONS IN THEIR PRESENT FORM WITHOUT WITHDRAWAL LIABILITY IN THE SAME STATUTORY SCHEME.

PBGC responds to the Trustees' argument that the "premium" provisions of the 1980 statute are inseverable from the "withdrawal liability" provisions and are, therefore, likewise invalid (Connolly Br., pp. 38-40) by simply

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[7]PBGC likewise seeks to minimize the Separation of Powers violation under the 1974 "premium" statute (*see* Connolly Br., pp. 40-42) by substituting legislative necessity for an "intelligible principle" to control the expenditure of funds, and by examining the reporting requirements in isolation from the overall legislative-administrative conduct involved. PBGC Br., pp. 41-42, n. 30. When PBGC had determined the mandatory guarantee program to be "unworkable," thereby making the "will not jeopardize" guideline conclusively unintelligible, and all funds expended by PBGC were for the benefit of constituents of the ranking members of the congressional committees exercising oversight, the overstepping of proper boundaries protected by the Separation of Powers principle is too flagrant to be excused.

pointing to the severability provision enacted in the 1974 statute. PBGC Br., p. 41, n. 30.[7] PBGC's cursory response does not address the crucial questions: (1) whether "[Congress] would . . . have enacted those provisions which are within its power, independently of that which is not," *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976), and (2) whether the "premium" provisions of the statute could be "fully operative as a law" upon invalidation of the withdrawal liability provisions. *I.N.S. v. Chadha*, ___ U.S. ___, 103 S.Ct. 2764, 2775 (1983). Having encouraged Congress in 1979 to enact "premium" rates ranging from $1 to $2.60 per employee annually, rather than $80 or more per employee (Connolly Br., p. 38, n. 21), based upon inclusion in the statutory scheme of property to be taken from employers as "withdrawal liability," PBGC cannot now argue persuasively that the same "premium" provisions would have been enacted and could serve the same purpose after "withdrawal liability" is stricken.

CONCLUSION

Based on the foregoing, the judgment should be reversed and the case remanded with instructions as set forth in the Conclusion of the Trustees' brief on the merits. Connolly Br., p. 43.

Dated: November, 1985.

Respectfully submitted,

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